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No. 98-28

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CARPENTERS LOCAL 209,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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REPLY BRIEF

Petitioner Carpenters Local 209 ("Union") responds to Respondent Anheuser-Busch, Inc.'s (Budweiser), Opposition to the Petition for Certiorari (Br. Opp.), filed September 28, 1998.

1. Budweiser concedes that the Ninth Circuit failed to conduct the independent review of the record required by *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), to determine whether the Union's statement was objectively false and, if so, whether the statement was made with knowledge that it was false or with reckless disregard for its truth. Br. Opp. at 6-7. Budweiser argues, however, that this error is harmless because the Ninth Circuit would necessarily have made these essential findings had it conducted a de novo review because "[i]n determining that the "rat" statement in this case was misleading, the District Court relied upon the Ninth Circuit's analysis of the same statement in *San Antonio*." Br. Opp. at 7 n.2.

In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230

(9th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, 137 F.3d 1090 (9th Cir. 1998), however, the district court enjoined only the Union's original banner. As Budweiser itself states: "[T]he Union later displayed a second banner alongside the original banner which identified the 'rat contractor' as 'Best Interior.' The court ruled that the second sign clarified the first sign, and that showing both signs in tandem did not constitute fraud." Br. Opp. at 11. On this point, the court actually stated: "the injunction had not been violated because the Union had clarified the misleading nature of the term 'rats.'" *San Antonio*, 125 F.3d at 1238.

Thus, the *San Antonio* court's pronouncement that the banner language was misleading applies only to the original banner in that case, not to the supplemented language Union employed after the injunction issued. Here, in contrast, the *original* banner included the very clarifying identification that was *not* contained in the original *San Antonio* banner—"RAT CONTRACTOR H.M.S.— language which, when its was added, "clarified the misleading nature of the term 'rats.'" *See also* argument 5 below. Budweiser is therefore simply wrong in contending that, because the court here relied on *San Antonio's* reasoning, its failure to apply the proper standard of review was harmless error. The contrary is true since the supplemented banner in *San Antonio* was found not misleading. And, in any event, *this* Court, if it conducted the independent review mandated by *Bose*, would have to find that the statement on the Union's banner is fully protected by the First Amendment, for all the reasons spelled out in the Petition at 24-28.

2. Respondent' Brief in Opposition reads as if the district court enjoined, with the Ninth Circuit's approval, *only* "the Union's use of the phrase, "Budweiser HAS RATS IN THEIR BREWERY." Br. Opp. At 2, 3, 26-27. The injunction, however, reached not only the further use of the banner previously displayed but, in the language of the injunction, *any* "advertisement or sign "using the word "Budweiser" and "expressly or impliedly repre-

senting . . . the false notion that the Van Nuys facility has a rodent or *any other loathsome problem.*" Pet. App. 11a (emphasis supplied). Thus, the injunction restrained *in advance of their utterance* not only the precise statement already made but also other statements concerning issues having nothing to do with "rats" of either the rodent or labor variety, statements whose truth or falsity cannot possible have been judicially determined.

3. Equally unavailing is Budweiser's effort to minimize the Ninth Circuit's total disregard for statutory and constitutional protections accorded speech during a labor dispute by maintaining that the Union somehow acceded to the districts court's refusal to hold a hearing. Br. Opp. at 3, 19.

Immediately prior to the hearing on the preliminary injunction, both sides submitted, at the district court's request, declarations and summaries of *proposed* testimony, *not* given under oath and never offered into evidence. Obviously no opportunity existed to cross examine the proponent or offer opposing evidence.[1] At the hearing

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[1] Budweiser also *lodged* a videotape that it represented was of one individual union member discussing the banner here at issue. Br. Opp. 3. This tape was not before the court at the TRO stage. Like the rest of the submitted material it was never formally offered into evidence and never admitted. Since the videotape is not in the record, it could not have been relied upon by the district court or the Ninth Circuit, and there is no indication that it was. Budweiser's current attempt to rely upon the videotape does demonstrates the potential prejudice to the Union from the district court's failure to hold a live hearing, as required by the Norris-LaGuardia Act. Because there was no such hearing, the Union never had an opportunity to cross-examine the speaker or the individual authenticating the videotape regarding who the speaker was, the circumstances under which the tape was made—for example, whether it was before or after the actual banner was displayed—or the knowledge of the speaker regarding the banner's actual purpose or wording. Nor was the Union able to contest the admissibility of the hearsay videotape as an admission against the Union on the ground that Budweiser had not established "clear proof of actual participation in, or authorization of . . . or of ratification of such acts after actual knowledge thereof" as required by Section 6 of the NLA, 29 U.S.C. § 106, or to present any opposition testimony thereto. *See*

itself both sides appeared with witnesses and announced to the district court they were ready to proceed. In response, the district court announced "This proceeding is going to be short and sweet. I don't need to hear any evidence on the case. I'm convinced that the injunction should issue." ER 18, 3:17-20. In other words, the district court announced *at the outset* of the preliminary injunction hearing its refusal to permit a hearing that included "testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto" as required by § 7 of the Norris-LaGuardia Act ("NLA"), 29 U.S.C. § 107.

Petitioner immediately argued that "the strict procedural requirements of the Norris-LaGuardia Act maintain[] that the Court does not have jurisdiction to issue the TRO or an injunction unless that's been complied with" ER 18, 4:22-5:4. Petitioner's counsel continued: "I'm not waiving any of the arguments that we've made in our opposition. I'm not waiving any arguments in the brief that we filed earlier." ER 18, 5:17-20. The earlier pleadings had expressly argued that a live hearing was required before the court had jurisdiction to issue an injunction in a labor dispute. ER 6. The district court agreed that where was no waiver, responding "I just want to save you time because I've determined that it should issue. I agree that all of your arguments should be preserved." ER 18, 5:21-23.

In short, the Union *did* request a live hearing consistent with the NLA, but the request was overruled by the court before the hearing ever began. And there *were* relevant facts in dispute, as Budweiser's attempt now to rely on "facts" never established through testimonial evidence. The disputed facts include, for example, the visibility of the sign as a whole and such facts relevant to the necessary "actual malice" as whether the Union intended to

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United Mine Workers v. Gibbs, 383 U.S. 715, 736 (1966) (NLA clear proof requirement is "clear, unequivocal, and convincing proof.").

cause anyone to believe that the brewery was in fact infested by rodents, or simply intended to get the attention of passersby through use of the dual-meaning word "rat". Yet, there would have been no point—and the Union's lawyers would have risked contempt—had the Union repetitively raised the live hearing issue given that the district court had definitively ruled that it would not take any testimony.

4. Budweiser seeks to avoid a grant of certiorari here by maintaining that this case does not involve a serious intrusion into well-established free speech principles, and therefore is of no particular significance. But the Ninth Circuit has *twice* in rapid succession, in this case and in *San Antonio, supra*, upheld injunctions regulating in advance the content of union *pure speech—not* picketing—during a labor dispute. And the second injunction, the subject of this Petition, arises from a banner which, in both form and content, is even more clearly a use of "ambiguity and flamboyance" to provide "the message . . its vigor" than was the banner in *San Antonio*. Pet. App. 31a (Kozinski, J., dissenting in *San Antonio*.)

What is fundamentally at issue here, as Judge Kozinski forcefully maintained in his dissent in *San Antonio* (Pet. App. 32a), goes beyond these particular parties, and indeed beyond speech uttered during labor disputes. The fundamental concern is whether the "profound national commitment to the principle that debate on public issues [which includes labor disputes] should be uninhibited, robust, and wide-open" can survive the "chilling effect" of repeated *ex parte* single judge regulation and censorship. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).[2] The importance of this issue favors exercise of the Court's discretion to grant certiorari.

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[2] The *San Antonio* case has been asserted as a basis for injunctions against other union banners with completely different messages, *e.g., Edwards Circuits Theatres v. Southern California-*

5. Respondent's brief reads throughout as if the Union banner enjoined in this case did not contain its third line —"LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." Br. Opp. At 2, 3, 26-27. This simplistic representation is entirely inaccurate.

Budweiser's only explanation for proceeding as if the banner had two lines instead of three is the assertion—without citation—that the third line was "not reasonably visible to the public passing by in their automobiles." Br. Opp. 2. But the photograph introduced into the record by the Union (Pet. App. 1a)—which was "materially identical" to the one submitted by Budweiser (Pet. App. 9a), and which Budweiser agrees is accurate (Br. Opp. 3)—does not support that conclusion. On that photograph, the third, *five-inch* high line is, as one would expect, just as visible as the second, *six-inch* high phrase "IN THEIR BREWERY." Pet. App. 1a.

Nor did the district court determine that the third line was not visible. Indeed, the district court could not have done so, since that court refused to "hear *any* evidence on the case." (ER 18, p.3, emphasis supplied) or to resolve any disputes in the declarations or proposed testimony. Instead, the district court expressly proceeded on the basis of "the documentary evidence alone"—that is, the photograph with a perfectly clear third line—in making its factual findings concerning the banner. Pet. App. 9a.

Since the injunction was not based on any finding that part of the banner was not legible, it could not have been upheld by the Ninth Circuit on that basis.

6. Budweiser seeks to justify this injunction by characterizing it as one that enjoins conduct, not speech. Br. Opp. at 28. This contention is absurd. The district

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Nevada Regional Council of Carpenters, Orange County Superior Court Case No. 798235 (filed August 14, 1998).

court's order does not purport to regulate or enjoin any "conduct," but is based squarely on the wording of the banner, nothing more. In particular, that order does not set time or place restrictions on the Union's use of its banner but rather entirely bars the use of particular language. Thus the injunction, far from regulating only a "secondary effect" (Br. Opp. at 29) of the Union's speech, censors the speech itself.

Budweiser and the *San Antonio* majority cite *Magill Bros., Inc. v. Building Service Employees' Int'l Union*, 20 Cal.2d 506, 127 P.2d 542, 545 (1942) as essentially their only authority that "false or fraudulent statements in picketing" are not protected by the First Amendment. *San Antonio*, 125 F.3d at 1239. *Magill* is inapposite both here and in *San Antonio* for picketing is not involved in either case. Both cases here involve injunctions against the peaceful and stationary display of a banner held by two stationary—here, sedentary—individuals. Actual picketing in this case ceased a week and a half before the beginning of the banner display.[3]

"[P]icketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment." *DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 580 (1988) (internal quotation and citation omitted). Accordingly, "[i]ndustrial picketing is more than free speech, since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Hughes v. Superior Court*, 339 U.S. 460, 464-465 (1950) (cita-

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[3] Based on these differences between banner display and patrolling with hand-held signs, the National Labor Relations Board General Counsel ruled that the *San Antonio* banner display and other similar baner displays do not constitute picketing, but are instead akin to handbilling and other forms of pure speech. ER 28.

tion omitted). Union speech during a labor dispute that does not involve picketing, in contrast, has been long understood as fully protected by the First Amendment. *DeBartolo*, 485 U.S. at 576.

7. Budweiser also maintains that the First Amendment prior restraint doctrine permits an injunction against an allegedly false statement because it "impringe[s] upon the plaintiff's business reputation." Br. Opp. at 29, citing *Martin v. Reynolds Metals Company*, 224 F. Supp. 978 (D. Or. 1963).[4] This contention has been squarely rejected by this Court.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971), stated emphatically that "the interest of an individual in being free from public criticism of his business practices in pamphlets and leaflets [does not] warrant use of the injunctive power of the Court." *Keefe*, 402 U.S. at 419-20. And this principal applies with regard to prior restraints against speech through an injunction whether the speech in question is false or true. *Keefe*, 402 U.S. at 418 ("the courts do not concern themselves with the truth or validity of the publication."); *see also Near v. Minnesota*, 283 U.S. 697, 714 (1932) ("The preliminary freedom extends as much to the false as to the true."); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting . . . their commercial self-

[4] Contrary to Budweiser's representation, the Ninth Circuit did not uphold the constitutionality of the district court's injunction in *Martin*, but dismissed the injunction appeal on procedural grounds. *Martin v. Reynolds Metals Company*, 336 F.2d 876 (9th Cir. 1964). Respondent's Ninth Circuit citation is to the decision upholding the district court's denial of defendant's motion to dismiss. *Martin v. Reynolds Metals Company*, 337 F.2d 780 (9th Cir. 1964). *See also Paradise Hills Associates v. Proceli*, 235 Cal. App. 3d 1528, 1541 (1991) (*Martin* "cannot be considered good law"); *Leonardi v. Shell Oil Co.*, 216 Cal. App. 3d 547, 572 (1989) (questioning the *Martin* court's rejection of "the majority American rule . . . that equity will not enjoin a trade libel").

interest simply does not qualify as grounds for imposing a prior restraint.")

More generally, this Court exercises extreme caution in regard to *all* injunctions against peaceful speech, stressing that before an injunction against pure speech can constitutionally issue "the gravity of the evil" condemned must be "demonstrated with the degree of certainty [the Supreme Court's] cases on prior restraints require." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 569 (1976). Applying this standard, the Court has, as far as we can determine, *never* upheld a prior restraint on speech involving matters of public concern on the basis of the harm the speech could cause. *See New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (refusing to uphold injunction against speech based on claims of breach of the national security); *Nebraska Press Ass'n, supra,* 427 U.S. at 568-570 (refusing injunction based on claims of infringement of Sixth Amendment right to a fair trial). The Union speech here was a matter of public concern. *See* Petition at 25-27 and n.13.

8. Budweiser *concedes* that the NLA requires that the district court determine in advance of issuing an injunction in a labor dispute that the union's acts *were* illegal, not just that they probably were. Pet. at 16; Br. Opp. at 19. Budweiser maintains, however, that the courts below applied the proper standard as to the legality of the Union's actions. Br. Opp. at 19. In fact, while the district court did find that the Union's actions were likely to continue (Pet. App. 8a: "Defendants displayed their poster intermittently over the course of a month"), on the merits of the legality of those actions the trial court held only that "[p]laintiff has shown probable success on the merits of the claims for fraud and dilution." Pet. App. 10a. The Ninth Circuit certainly so understood the district court's conclusions. Pet App. 4a: "the district court . . . concluded that appellee[] show[ed] . . .

probable success on the merits." Yet the Ninth Circuit did not reverse for failure to find that a Lanham Act violation or common law fraud actually occurred—findings which, as the Petition demonstrates, could not have been sustained. *See* Pet. 16-19.

CONCLUSION

Because the Ninth Circuit upheld, both in this case *and* in *San Antonio*, speech-censoring injunctions in blatant violation of well-established First Amendment and NLA principles this Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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